STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

TDS Metrocom, LLC,	**)**	
	)	
v.	**)**	
	)	
Illinois Bell Telephone Company	**)**	**Docket No. 03-0553**
	)	
Complaint concerning imposition of	**)**	
unreasonable and anti-competitive termination	**)**	
charges by Illinois Bell Telephone Company.	**)**	

REPLY BRIEF OF TDS METROCOM, LLC

Peter R. Healy
Manager CLEC External Relations
TDS Metrocom, LLC
525 Junction Road, Suite 6000
Madison, Wisconsin 53717
(608) 664-4117
peter.healy@tdsmetro.com

Owen E. MacBride
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5680
omacbride@schiffhardin.com

June 25, 2004

TABLE OF CONTENTS

I. SUMMARY OF TDS METROCOM'S REPLY TO SBC ILLINOIS AND STAFF

Despite the efforts of Illinois Bell Telephone Company ("SBC Illinois" or "SBC") to present complex evidence and arguments to justify its newly-adopted termination liability provisions for long-term contracts, this case can be reduced to a few simple propositions that mandate the outcomes urged by TDS Metrocom, LLC ("TDS Metrocom"):

1. In its Order on Rehearing in *Association of Communications Enterprises v. Ameritech Illinois*, Docket 00-0024 ("*ASCENT* Case" or "*ASCENT* Order"), the Commission conducted an extensive analysis of the applicable law pertaining to reasonable and unreasonable contractual termination liability provisions, and specified a form of termination charge provision that comported both with contract law and the needs of the competitive telecommunications market – the "give back the discount" approach. There is really no need to reanalyze this topic, as SBC has attempted to do. The Commission in its *ASCENT* Order determined the appropriate form of termination charge provision for the dominant local service provider – a position SBC retains today -- to include in its long-term contracts and tariffed calling plans. SBC should be directed to incorporate the "give back the discount" approach for its long-term contracts and tariffed calling plans for which SBC has not already adopted the *ASCENT* Order approach.

2. Contrary to SBC Illinois' assertions, the business telecommunications market is not so competitive as to warrant departing from the principles the Commission articulated, and the form of termination charge provision it found to be reasonable, in the *ASCENT* Order. As its own evidence shows, SBC continues to control some 65% of the business market based on network access lines and usage – a percentage that is huge to every player in the market except SBC. Obviously, none of the 79 competitive local exchange carriers ("CLEC") that SBC says

are in the Illinois local service market have a market share that in any way approaches SBC's market share, or the market power that goes with it.

Further, the fact that the other seven CLECs surveyed by SBC use the "percent of remaining revenues" approach is irrelevant.[1] None of those CLECs (or any CLEC, for that matter) has been shown to have any significant share of the business telecommunications market. TDS Metrocom is not concerned about being foreclosed from competing for business customers by the actions of other CLECs that lack market power. TDS Metrocom is concerned about being foreclosed from being able to compete for the business of customers who sign discounted long-term contracts with the single *dominant* provider in the market, SBC.

3. Alternatively, if the Commission decides to accede to SBC Illinois' request to continue to use its preferred form of termination liability provision – the "percent of remaining revenue" approach – SBC's termination charge percentages of 25% for Centrex services, 35% for Usage services and 50% for Data/Transport services are excessive and unjustified.[2] It does not take sophisticated analysis of the cost studies proffered by SBC in this case to recognize that the net profits of 25% to 50% that SBC's studies purportedly show it earns **on long-term contracts with discounted prices** are either implausible (if the business telecommunications market is as competitive as SBC asserts), unreasonable or both. If the Commission does determine to allow SBC to continue to use its preferred form of termination charge, the

[1]Contrary to SBC's characterizations in its Initial Brief (p. 10), SBC did not demonstrate that TDS Metrocom is the only one of the 79 Illinois CLECs that uses the "give back the discount" approach. Rather, SBC's assertion is based on a review of the termination charge practices of only eight selected Illinois CLECs (including TDS Metrocom). (SBC Ill. Ex. 1.0, p. 25)

[2]In our Initial Brief, TDS Metrocom referred to the third category of services listed as "Data/other" services. SBC Illinois and Staff have referred to these services as "Transport/Other" or "Data/Transport" in their Initial Briefs. However, the parties are referring to the same categories of telecommunications services with these labels.

Commission should limit the "percent of remaining revenues" in SBC's termination charges to no more than 25% -- which is the percentage that SBC itself has adopted for one of the three major categories of business telecommunications services.

4. TDS Metrocom respectfully disagrees with Staff's primary recommendation that the Commission should initiate an industry-wide rulemaking on the topic of termination charges. While TDS Metrocom appreciates Staff's objective of studying this topic in detail and with opportunity for a broad range of industry input, participation in such a rulemaking proceeding is far from a costless exercise for the carriers. With the large increases in SBC's unbundled loop charges and related nonrecurring charges that the Commission has just imposed on CLECs in Docket 02-0864, minimizing administrative and overhead costs has become even more important to TDS Metrocom and, we surmise, to other CLECs attempting to stay in the market in Illinois. More importantly, however, in the ASCENT Order the Commission has *already* determined the appropriate form of termination charge provision for the dominant carrier, SBC, based on principles of contract law and the needs of the competitive market. TDS Metrocom notes that although Staff's primary recommendation is that the Commission initiate a rulemaking on termination charges, Staff recommends adoption of the "give back the discount" approach, as recommended by TDS Metrocom, over SBC's "percent of remaining revenue" approach if the Commission does not elect to initiate a rulemaking.

5. SBC should be required to provide termination charge calculations to CLECs who present written authorization from a customer to request and obtain this information. SBC has failed to provide any basis for refusing to provide this information to the CLEC, as the customer's representative, where the customer has given the CLEC written authorization to request and obtain the information on the customer's behalf. The Commission should prevent

SBC from abandoning its practice of providing these calculations, which are vital information for CLECs seeking to compete with SBC for the customer's business.[3] Moreover, to reduce the burden that SBC claims providing termination charge calculations has imposed, SBC could take less drastic steps than completely ceasing to provide the calculations to duly-authorized CLECs.

These points are addressed in greater detail in the remainder of this Reply Brief.

II. TERMINATION CHARGE PROVISIONS

A. Response to SBC

1. "Give Back the Discount" Approach

As discussed at pages 7-9 and 15-16 of TDS Metrocom's Initial Brief, in the *ASCENT* Order, the Commission thoroughly reviewed the applicable legal principles pertaining to termination liability provisions imposed by SBC, as well as the impacts of SBC's termination liability provisions on the competitive market, and concluded that SBC should adopt the "give back the discount" approach for the services that were the subject of that case. As the Commission pointed out, both Restatement of Contracts §356 and the Uniform Commercial Code (810 ILCS 5/2-718) specify that damages for breach may be liquidated in an agreement at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss; and that a contract fixing unreasonably large liquidated damages is void and unenforceable as a penalty. (See *ASCENT* Order, pp. 19-20) In filing its Complaint, based on having encountered instances of SBC applying the same sort of termination penalties for other services that the Commission had found unreasonable and anticompetitive in the *ASCENT* Order, TDS Metrocom believed that the Commission should apply the same principles

[3] SBC intends to continue providing termination charge calculations to CLECs having written customer authorization only for the specific services involved in the *ASCENT* Case, where the Commission first imposed this requirement.

it articulated and the conclusions it reached in the *ASCENT* Order to other services not expressly covered by that Order. Even though SBC implemented new termination liability provisions during the course of this case, there is no reason for the Commission to depart from the *ASCENT* Order approach.

As the Commission did in the *ASCENT* Case, the reasonableness of the termination liability provision should be looked at from the perspectives of both the service provider and the customer. From the service provider (SBC's) point of view, reasonableness can be evaluated based on its lost revenues and avoided costs if the customer terminates the contract prior to expiration. In this case, SBC presented cost studies that purported to show its saved costs and lost profits if a business customer terminates a contract or term calling plan prior to expiration. However, with one exception (discussed below), these studies do not necessarily show that SBC's prospective lost revenues are any different if a business customer on a term contract terminates the contract than if a non-contract (i.e., month-to-month) customer for the same service switches to a CLEC rather than staying with SBC for the same time period. What SBC <u>really</u> loses if a customer terminates a term contract or calling plan is the benefit of its bargain to charge reduced rates in exchange for the customer's term commitment. As the outcome of the *ASCENT* Order recognizes, the "give back the discount" approach restores SBC to the position it would have been in if SBC and the customer had originally agreed to a contract or calling plan of the duration that the customer actually completed, with the associated pricing. Thus, the "give back the discount approach" that the Commission directed in the *ASCENT* Order is reasonable and fair from SBC's viewpoint.

From the customer's viewpoint, the "give back the discount" approach is reasonable too. The customer is not unjustly enriched by getting to keep discounts in excess of what the customer would have obtained had it originally entered into a contract or calling plan of the duration it actually completed. Rather, the customer only winds up with the discounts it would have received had it originally entered into a contract or calling plan of the duration it actually completed. Thus, the customer has not been subjected to unreasonably large liquidated damages.

Thus, contrary to SBC's arguments (SBC Initial Br., p. 19), TDS Metrocom's recommended "give back the discount approach" *does* "comport with common notions of contractual obligation and equity."

SBC argues that the "give back the discount" approach adopted in the ASCENT Order and recommended by TDS Metrocom here is actually less competition-friendly than SBC's percent of remaining revenues approach because, according to SBC, the "give back the discount approach" produces a higher termination charge in approximately 60% of the months in a term contract. (SBC Initial Br., p. 18) TDS Metrocom does not dispute that, as a general matter, in the early months of a term contract or calling plan, the "percent of remaining revenues" approach will produce a higher termination charge than the "give back the discount" approach, while in the later months of the contract term the "give back the discount" approach will produce a higher termination charge. However, in terms of the impacts of termination liability provisions on the ability of SBC, the dominant provider, to tie up business customers for extended periods, on the ability of CLECs to compete for business customers (and on the size of the available customer base for which CLECs can compete), and thus on the development of a competitive market, it is the early years of a long-term contract that are critical. As TDS Metrocom's Vice President-Sales, Mr. Loch, explained:

> The "return the discount approach" advocated by TDS Metrocom (and specified by the Commission in the ASCENT decision) is more pro-competitive because it produces lower termination charges in the early years of the contract. It is in the early months of a long-term contract when the potential

> anticompetitive impacts of a termination charge in terms of discouraging the customer from considering other suppliers may be most pronounced, because the large termination charge at that point effectively locks up the customer with SBC for two or more years in to the future. In contrast, in the last few months of a customer's term contract, a potential new carrier may not be interested in trying to get the customer to terminate the contract and switch regardless of the termination charge – the new carrier can simply wait the relatively few remaining months until the existing contract expires, or even try to sign the customer to a new contract to go into effect when the customer's old contract expires. (TDS Metrocom Ex. 1.5, pp. 5-6)

Mr. Loch's testimony refutes SBC's unsupported assertion that "most competitors would focus their marketing efforts on customers as their contracts expired." (SBC Initial Br., p. 20)

Although SBC criticizes this reasoning (SBC Initial Br., p. 20), its own evidence and arguments help to substantiate TDS Metrocom's position that it is in the early years of the term contract that an unreasonable termination charge provision is most detrimental to competition. As SBC points out, a number of business customers roll off of their long-term SBC contracts or tariff plans each year and thus again become contestable by SBC's competitors. (SBC Initial Br., p. 13) For this reason there is no great incentive for a CLEC to seek to persuade an SBC customer to switch to the CLEC, by offering to reimburse the customer's termination charge, when the customer is within a few months of the expiration of its contract or calling plan. But if a large termination charge in the early years of an SBC term contract or calling plan effectively precludes a business customer that has signed a three-to-five-year contract with SBC from considering switching to a competitor until the latter part of the contract term (the result that would obtain under SBC's proposed termination liability provisions), that customer has been locked up by SBC, and locked away from competitors and the competitive market, for an extended time period.[4]

---

[4]TDS Metrocom witness Mr. Loch pointed out that the limitation on the "give back the discount" approach to one year as adopted by the Commission in the *ASCENT* Order would address SBC's

As noted above, there is one exception to the proposition that the "give back the discount approach" is reasonable because it leaves SBC in the position it would have been in had the customer originally entered in to a contract or tariffed calling plan with the duration that the customer actually completed. That exception is if SBC incurred costs for special construction to serve the customer but waived the special construction charges (that the customer otherwise would have been required to pay) in consideration and anticipation of the customer entering into a long-term contract, or if SBC waived other "up front" charges in consideration of the customer entering into a term contract, such as service initiation or activation fees. TDS Metrocom believes that SBC should be allowed to recoup such charges from a business customer that terminates its term contract or calling plan, in addition to receiving the termination charge resulting from the "give back the discount" calculation. As TDS Metrocom witness Mr. Loch testified after describing the "give back the discount" approach:

> In addition, TDS Metrocom views it as reasonable to also require the customer to reimburse the provider for one-time or "up front" charges, such as service installation charges or special construction charges, that the contract provided would be waived or reduced. (TDS Metrocom Ex. 1.0, p. 9)

SBC's suggestion that TDS Metrocom's recommended approach would not allow SBC to recover such costs is incorrect. (SBC Initial Br., p. 21)

---

concern that the "give back the discount" approach produces higher termination charges the farther one goes into the contract term. (TDS Metrocom Ex. 1.5, pp. 6-7) Contrary to SBC's suggestion (SBC Initial Br., pp. 18-19), TDS Metrocom is not proposing that this limitation be imposed on the SBC services not covered by the *ASCENT* Order. TDS Metrocom continues to propose a form of termination charge provision that is more favorable to SBC than the specific form of termination charge ordered by the Commission in the *ASCENT* case. Mr. Loch was simply pointing out that the precise form of termination charge provision ordered in the *ASCENT* Case addressed SBC's "concern", and that "the testimony of SBC witnesses including Dr. Frankel effectively makes the case for requiring the limitation specified in the ASCENT case." (*Id*., p. 7)

SBC also argues that there is no longer any reason for the Commission to specify the form of termination charge provision that SBC must use for business services because the market is much more competitive than it was at the time of the *ASCENT* Case. (SBC Initial Br., pp. 14-17) The facts do not support SBC's argument. SBC's own evidence shows that SBC retains 65% of the business telecommunications market based on network access lines and usage. (*Id.*, pp. 15-16) While a 65% market share may look small to a company that was once a monopolist in the local service market, it remains huge from the perspective of SBC's competitors. Further, the remaining 35% (according to SBC's figures) of the business market is divided up among numerous CLECs (79 according to SBC, see *id.*, p. 15), so obviously none of these CLECs has anywhere near the market share and market power that SBC continues to possess. As Mr. Loch articulated from his real-world perspective of competing with SBC for business customers:

> A market share of 65% may seem like a small number only because SBC once had almost 100% of the market. While I am not a Ph.D economist or an anti-trust expert, as a businessman I would view a 65% market share in any industry as giving the company that possessed that market share market power. Further, it is obvious that the business lines served by CLECs are divided up among numerous CLECs and that no single CLEC has a market share in any way approaching that of SBC. (TDS Metrocom Ex. 1.5, pp. 4-5)

With SBC retaining 65% of the business telecommunications market, the available customer base for which CLECs may compete is necessarily small, and unreasonable termination charge provisions that allow SBC to lock up otherwise-available business customers for significant periods further shrink that available base of customers.[5] Moreover, the evidence shows that SBC has been extremely successful in this regard – for example, in the three years 2001-2003, SBC

[5]SBC contends that CLECs have the alternative of assuming an existing SBC customer contract for the remainder of the contract term. (SBC Initial Br., pp. 13-14) TDS Metrocom fails to understand how this can be a reasonable alternative. By assuming the contract, the CLEC assumes responsibility for <u>100%</u> of the customer's revenue obligation for the remainder of the contract term.

had hundreds of contracts for Usage services in effect, and none of these were terminated. (See TDS Metrocom Initial Br., pp. 11-12; TDS Metrocom Ex. 1.0, pp. 16-17; TDS Metrocom Ex. 1.1) Contrary to SBC's assertion (SBC Initial Br., p. 14), the evidence in this case of the anticompetitive impacts of SBC's termination charge provisions is much more comprehensive than just "anecdotal evidence of foreclosure."

Contrary to SBC's repeated suggestions (SBC Initial Br., pp. 18, 19, 27), TDS Metrocom is not recommending that SBC Illinois be ordered to use the "give back the discount" approach adopted in the *ASCENT* Order for all term contracts and tariffed calling plans for Usage, Centrex and Data/Transport/other services because that is the approach that TDS Metrocom uses. Rather, TDS Metrocom is recommending that SBC be required to use the "give back the discount" approach because it is the approach that the Commission already found to be reasonable, appropriate and pro-competitive in the *ASCENT* Order based on a though review of contract law principles and of the impacts on customers, competitors and the competitive market of the different approaches. SBC has simply not presented any evidence or argument that justifies revisiting the conclusions or departing from the approach that the Commission found to be reasonable and appropriate in the *ASCENT* Order.[6]

[6]TDS Metrocom does not agree with SBC (SBC Initial Br., p. 27) that if the Commission requires SBC to use the "give back the discount" approach (or any other approach) it should also direct all other carriers to use that approach. There is a difference between SBC and the 79 CLECs – SBC controls 65% of the business market, whereas obviously no CLEC has a market share anywhere near that percentage. SBC has market power whose use must be subject to reasonable limitations; the CLECs (individually and collectively) do not. As stated earlier, TDS Metrocom is concerned about the size of the contestable business telecommunications market being constricted by SBC's termination charge policies; it is not concerned about the size of the contestable market being constricted by the practices of individual CLECs that lack market share and market power.

Staff concurs that the Commission's analysis, reasoning and method of calculating termination liabilities from the *ASCENT* Order are sound and could be applied to the SBC-provided services at issue in this complaint proceeding. (Staff Init. Br., p. 13)

2. <u>SBC's Proposed Termination Charge Provisions</u>

During the course of this proceeding, SBC Illinois announced that it would be implementing new termination liability provisions for its term contracts and tariffed calling plans. (See SBC Initial Br., pp. 2-3) Except for those service offerings that were expressly the subject of the *ASCENT* Case (for which SBC will continue to use the "give back the discount" form of termination liability provision), SBC's new termination liability provisions all use the "percent of remaining revenue" approach. TDS Metrocom stated in testimony and in our Initial Brief that SBC's new policies – which are based on percentages of remaining revenue of 35% for Usage Services, 25% for Centrex Services, and 50% for Data/Transport/other services – are an improvement over SBC's previous termination liability provisions that required termination payments of 50% to 100% of the customer's revenue commitment for the remainder of the contract. (See TDS Initial Br., p. 17) However, TDS Metrocom pointed out that the termination charges resulting from SBC's new policies are still large in the absolute and provide a strong deterrent to any customer from terminating a long-term contract or calling plan to take service from a CLEC. (See *Id.*, pp. 12-13, 17-18) Therefore, TDS Metrocom continues to recommend that *if* the Commission decides to allow SBC to employ the new termination liability provisions (rather than requiring SBC to adopt the "give back the discount" approach for all services), the Commission should direct that SBC should not apply a "percent of remaining revenue" percentage in its termination charges greater than 25%. This is the percentage SBC is applying to Centrex Services contracts under its new policies.

SBC points out that in the *ASCENT* Case there was general agreement among the parties that the appropriate standard for what a service provider should be allowed to recover through a contractual liquidated damages or termination liability clause is the provider's "lost profits" or "net profits" resulting from the early termination of the contract. (SBC Initial Br., pp. 7-8) SBC contends that its new termination liability provisions are based on cost studies that calculate SBC's lost profits from early termination of each type of service contract or calling plan (Usage, Centex and Data/Transport). However, if this is true, the result of SBC's cost studies and its new termination liability provisions is that SBC is realizing net profits on its term contracts and calling plans of 25% for Centrex Services, 35% for Usage Services and 50% for Data/Transport/other services. Further, these net profits are being realized (according to SBC's studies) on term contracts on which SBC has provided *discounted prices* to the customers, and in a market that (according to SBC) is highly competitive.

TDS Metrocom reiterates that it is illogical and implausible that SBC is realizing net profits of 25% to 50% on term contracts that provide for discounted prices and that are entered into in a market that is purportedly highly competitive. The Commission need not accept SBC's assertion that it is realizing net profits of 25% to 50% on these contracts. Although neither TDS Metrocom nor Staff presented their own cost studies in response to SBC, the Commission is not required to accept even unrebutted cost study evidence if it is not credible. *City of Chicago v. Commerce Commission*, 15 Ill. 2d 11, 16 (1958). On the other hand, if SBC's cost studies are accurate, the net profit margins of 25% to 50% are unreasonable. Although the two figures are not directly comparable, the Commission should consider the reasonableness of the 25%-50% net profits on "competitive" services indicated by SBC's cost studies and new termination charge policies in light of the 8.96% overall cost of capital (return on investment) and the 12.44% rate of return on equity that the Commission recently adopted in setting SBC's rates for unbundled loops – rates of return that are intended to be forward-looking costs of capital in a competitive market. (Order in Docket 02-0864, June 9, 2004, p. 87)

TDS Metrocom continues to recommend that if the Commission does not decide to require the use of the "give back the discount" approach for all SBC business term contracts and tariffed calling plans, the Commission should order that the "percent of remaining revenues" in SBC's termination liability provisions not exceed 25%. The 25% figure is equal to the percentage chosen by SBC itself for the termination liability provisions in its Centrex Services contracts, and would still represent a generous "net profit" allowance for SBC on its discounted term contracts and calling plans. It would reduce the absolute amount of SBC's termination charges, particularly for Usage Services and Data/Transport/other services, thereby reducing SBC's ability to lock up business customers for multi-year periods and to shrink the size of the business telecommunications market for which CLECs can compete, thereby benefiting the continued development of the competitive market.[7]

B. Response to Staff Proposal for a Rulemaking

Staff's alternative recommendation is that "the Commission adopt TDS' proposal to order SBC to implement a termination liability policy based upon the Commission's order in the *ASCENT* proceeding" (i.e., the "give back the discount" approach). (Staff Initial Br., p. 9) Therefore, TDS Metrocom has no reply to Staff on this substantive point. Staff's primary

[7]Referring to the termination charges that TDS Metrocom calculated for the representative Usage Services contracts that SBC produced in discovery, under SBC's previous termination liability provisions, Staff states that "TDS claims that some of the SBC early termination penalties range between $12,800 and $3,400,000." (Staff Initial Br., p. 10) So that there is no confusion, we note that the termination charges TDS Metrocom calculated for the representative contracts under both the old and new SBC policies (see TDS Metrocom Initial Br. pp. 10-11 and 12-13), and that Staff cites, are *per remaining year of the contract term*.

recommendation, however, is that the Commission should initiate an industry-wide rulemaking on termination charges. While TDS Metrocom appreciates Staff's interest in studying the issue of termination charges on a comprehensive basis, TDS Metrocom respectfully disagrees with Staff's recommendation to initiate a rulemaking, for several reasons.

First, as discussed earlier in this Reply Brief and in TDS Metrocom's Initial Brief, the Commission has already thoroughly reviewed, considered and applied the applicable legal principles in the *ASCENT* Order. There is no incremental benefit to revisiting these principles in a rulemaking proceeding.

Second, a rulemaking proceeding would require considerable time and resources from TDS Metrocom, and from other CLECs that participated in the rulemaking proceeding. Given the records that have been developed and the legal analysis that has been conducted in the *ASCENT* Case as well as in this docket, there is not an incremental benefit to be gained from a new rulemaking proceeding. Further, at this time in particular, with significant increases in SBC's unbundled loop rates and related non-recurring charges having just been imposed by the Commission on facilities-based competitors such as TDS Metrocom, minimizing administrative and overhead costs is of great importance to CLECs as they try to stay cost-competitive so that they can remain in the Illinois market.

Third, there is a complaint pending in this docket with specific relief requested. Staff's primary recommendation – to initiate a rulemaking proceeding – does not appear to be accompanied by a recommendation for specific action in this docket. However, the Commission must render a decision on the Complaint in this docket. The Commission's order in this docket – even if it were to deny the Complaint, which would be construed as conferring the Commission's blessings on SBC's termination liability policies -- would seem to pre-ordain the outcome of any rulemaking proceeding.

Fourth, the history of recent Commission rulemakings would not bode well for a speedy resolution of a rulemaking proceeding on termination liability provisions. See, e.g., Docket 01-0539, the Part 731 rulemaking, which was initiated in response to a legislative mandate enacted in 2001 that the Commission promulgate wholesale service quality rules, but which three years later has not yet resulted in a rule being in effect.

Finally, TDS Metrocom disputes any implication that a rulemaking is necessary because if SBC is required to use a particular form of termination liability provisions, all telecommunications carriers should be required employ the same termination liability provision. (See Staff Initial Br., pp. 14-15; see also SBC Initial Br., p. 27) As discussed earlier in this Reply Brief, there are legitimate bases for the Commission to impose specific requirements and limitations on SBC with respect to the termination liability provisions it employs, but not on other CLECs. These reasons include SBC's market share, its legacy as the monopoly provider, and the market power that these characteristics impart. No CLEC is comparable to SBC in these regards.

Accordingly, the Commission should adopt Staff's secondary recommendation of requiring SBC to adopt the "give back the discount" form of termination liability provision (consistent with that adopted in the *ASCENT* Order) for all term contracts and tariffed calling plans for business telecommunications services.

III. PROVISION OF TERMINATION CHARGE CALCULATIONS TO CLECS WITH CUSTOMER AUTHORIZATION

TDS Metrocom's Initial Brief, pages 19-25, adequately addresses most of SBC's substantive arguments on this issue. Although SBC admits that because it was allowed to file the

Supplemental Testimony of Michelle Kent on this topic, any purported prejudice it suffered by inclusion of this issue in this case has been cured, SBC nonetheless reiterates its arguments that this issue is not appropriately addressed in this docket. (SBC Initial Br., p. 23) In response, TDS Metrocom refers the ALJ and the Commission to TDS Metrocom's Response to SBC Illinois' Motion to Strike, filed April 26, 2004 ("TDS Response"). TDS Metrocom emphasizes that it did not become known that SBC Illinois intended to cease its practice of providing termination charge calculations to CLECs that have written authorization from the customer to request and receive this information until after the Complaint in this docket was filed – a fact that SBC has not disputed. (See TDS Response, pp. 2-3) Indeed, this Complaint was filed only because TDS Metrocom learned, as a result of obtaining termination charges calculations from SBC for specific customers pursuant to written authorization from those customers, that SBC was imposing termination charges on business customers that TDS Metrocom considered to be excessive, unreasonable and contrary to the *ASCENT* Order.[8] Further, TDS Metrocom reiterates that in the *ASCENT* Case, where the Commission first imposed the requirement that SBC provide termination charge calculations to CLECs that have customer authorization to request and receive them, this requirement was neither requested in the complaint nor requested by the complainant during the course of the case. Rather, it was adopted and imposed by the Commission on its own initiative. (See TDS Response, pp. 4-5)

With respect to the substantive issue, SBC has not provided any basis for being able to refuse to provide termination charge calculations to a CLEC (or to any third party) that the customer has, through written authorization, appointed as the customer's agent to request and

[8]Notwithstanding SBC witness Ms. Kent's testimony concerning the reasons for SBC's change in policy, TDS Metrocom considers the timing of SBC's change in policy regarding provision of termination charge calculations, occurring contemporaneously with or shortly after this Complaint was filed, to be curiously coincidental.

receive this information. Further, although Ms. Kent's Supplemental Testimony offers a number of reasons why providing termination charge calculations to duly-authorized CLECs was becoming burdensome to SBC, the experience on which Ms. Kent's testimony was based apparently occurred while SBC's old termination liability provisions were in place. As SBC itself describes its former policies:

> Prior to the filing of TDS' complaint, the Company's tariffs and contracts contained termination liabilities that varied widely by product and service: some were "forward-looking" (i.e., the liability was based on a percentage of what was left on the contract), some were "backwards looking" (i.e., the liability was based on the savings the customer achieved for the contract period already completed) and the size of the liability differed widely. . . These differences did not reflect any economic or other differences between the products and services, but rather the accumulation of individual product managers' decisions over a long period of time." (SBC Initial Br., pp. 2-3; record citations omitted)

Clearly, a large part of the time that SBC personnel were required to spend in calculating termination charges, according to Ms. Kent, was spent in figuring out SBC's own termination liability provisions and determining which one applied to the particular customer or contract. However, whether the Commission in this case requires SBC to apply the "give back the discount" approach to all services, or allows SBC to continue to use its new termination liability policies, SBC will be operating, going forward, with a greatly reduced and simplified menu of termination charge provisions. Thus, SBC's experience under its previous, widely-varying termination liability provisions does not provide a good basis for justifying ceasing to provide termination charge calculations to customer-authorized CLECs.

SBC states that it will continue to provide termination charge calculations directly to the customer, upon request.[9] If one assumes that SBC will continue to get the same volume of

[9]SBC has stated that, in strict compliance with the *ASCENT* Order, it will continue to provide termination charge calculations directly to customer-authorized CLECs for the ValueLink and related service offerings that were the subject of the *ASCENT* Order.

requests directly from customers that it previously has received from customer-authorized CLECs, then the refusal to provide termination charge calculations to CLECs will not reduce the administrative burden of which SBC complains. Thus, in adopting its new policy, SBC must have recognized that the customer is less likely to follow up and make the request for termination charge information than is the CLEC – and its assertion that there is no need for SBC to provide termination charges calculations to CLECs, because a CLEC can always ask the customer to make the request, is fatuous. (SBC Initial Br., pp. 24-25) The result, therefore, of SBC's new policy of refusing to provide termination charge calculations to customer-authorized CLECs will be a reduced flow of competitively useful information to SBC's competitors. It will also provide SBC the opportunity to interact directly with the customer at the time of the customer's request for termination charge calculations in order to attempt to dissuade the customer from terminating the SBC contract or calling plan. (See TDS Metrocom Initial Br., pp. 21-22)

TDS Metrocom reiterates that there are a number of less drastic steps that SBC could take to ease the administrative burden it claims to be experiencing as a result of termination charge calculation requests from customer-authorized CLECs, such as proposing to lengthen the required response time from three business days to five business days/seven calendar days. (See TDS Metrocom Initial Br., pp. 24-25) The drastic step of ceasing to provide termination charge calculations to CLECs that have written authorization from the customer to request and receive this information has not been justified. Accordingly, the Commission should direct (consistent with Finding (10) of the *ASCENT* Order) that for all multi-year contracts and tariffed plans for Usage, Centrex and Data/Transport/other services, SBC should provide a calculation of the termination liability to which a customer taking service under the contract or tariffed plan would be subject, to a CLEC that has written authorization from the customer to request and receive the termination charge calculation.

IV. AWARD OF FEES AND COSTS TO TDS METROCOM

SBC argues that the Commission cannot order SBC to reimburse TDS Metrocom for its fees and costs (as TDS Metrocom has requested) without a finding that SBC's current or previous termination charge provisions are or were anticompetitive. While TDS Metrocom disagrees with this assertion, the record in this proceeding is certainly sufficient for the Commission to make findings (i) that SBC's previous termination liability provisions were unreasonable and anticompetitive, and (ii) that SBC adopted new termination charge provisions in response to TDS Metrocom's Complaint.

TDS Metrocom filed its Complaint alleging that SBC's termination liability provisions were unreasonable and anticompetitive because they violated the principles articulated by the Commission in the *ASCENT* Order. TDS Metrocom's Complaint identified specific SBC customer contracts that contained termination liability provisions that used the approach rejected by the Commission in the *ASCENT* Order (for ValueLink and related offerings) and which produced termination charges so substantial that they dissuaded business customers that were otherwise interested in considering switching to TDS Metrocom from doing so. TDS Metrocom presented direct testimony supporting the specific allegations of the Complaint, as well as identifying an additional incident encountered by TDS Metrocom in which a customer contract included a termination charge provision of the type rejected in the *ASCENT* Order, and which produced a substantial termination charge. TDS Metrocom also provided additional evidence in its direct case, using information obtained through discovery, that SBC's use of similar termination charge provisions was widespread and that the termination charge provisions of which TDS Metrocom complained produced termination charges so substantial that they would make it uneconomic for the customer to consider switching, or for the CLEC to be able to pay the termination charge in order for the customer to switch. TDS Metrocom's evidence showed that although SBC had hundreds of term contracts with business customers in place during the period 2001-2003 with termination charge provisions, virtually none of these contracts were terminated early. (See TDS Metrocom Initial Br., pp. 5-7, 9-12, 13-16)

SBC did not respond substantively to TDS Metrocom's evidence concerning SBC's previous termination liability provisions, and made no attempt to defend the reasonableness of the previous termination liability provisions.[10] Instead, SBC announced new termination liability provisions, and asserted that only its new policies, rather than its previously-employed provisions, should be evaluated by the Commission. On the basis of the evidence presented by TDS Metrocom, which was essentially unrebutted by SBC, the Commission can find that the SBC termination charge provisions that motivated TDS Metrocom's Complaint and on which the Complaint was based were anticompetitive and unreasonable.[11]

---

[10]In light of SBC's failure to present evidence on the reasonableness of its previous termination charge provisions, the Commission should regard this point as waived if SBC makes any belated attempts to demonstrate the reasonableness of the prior provisions.

[11]TDS Metrocom disputes SBC's assertion (which is supported by no record citation) that since 2002, SBC's termination charges for Usage Services have ranged between 35% and 50% of remaining revenues under the contract. (SBC Initial Br. P. 33) TDS Metrocom's Complaint was prompted by three contracts for usage services, encountered by TDS Metrocom in 2003, that provided for termination charges of 50% to 100% of the annual revenue commitment. Two of these contracts were entered into in 2002. (See TDS Metrocom Ex. 2.0) Information provided to TDS Metrocom in discovery during 2003 showed additional usage contracts entered into in 2002 with 50% termination liability provisions plus usage contracts from earlier years still in effect in 2002 with higher termination liability percentages, up to 100%. (See TDS Metrocom Exs. 1.2 and 1.3)

Moreover, Staff also presented evidence demonstrating the unreasonableness and anticompetitive nature of SBC's previous termination liability provisions. As summarized in Staff's Initial Brief:

> Staff witness Mr. Omoniyi testified that SBC's pre-March 2004 termination liability policies had the following negative implications to customers, competing carriers and the public: First, a customer that terminates its agreement with SBC based on their current [i.e., pre-March 2004] termination penalty policies risks bearing a sizeable penalty that is not proportional to the actual loss that such customer caused SBC. Second, such customers are not likely to switch their services to a competing carrier (such as TDS Metrocom) even when the customer may be seeking a new telecommunications carrier. SBC's early termination policies, consequently, may create a chilling effect on customers. Finally, a situation in which customers cannot switch or are prevented from switching to another competing carrier will likely reduce the number of customers that all carriers can compete for in the marketplace. (Staff Initial Br., pp. 9-10 (citing Staff Ex. 1.0, pp. 8-9))

Referring to SBC's previous termination liability provisions, Staff also pointed out that "a situation in which customers cannot switch their services as a result of the size of the penalties they would incur can only lead to those customers remaining with SBC. . . customers who cannot leave as a result of the high penalties will remain more or less captive customers to SBC." (Staff Initial Br., p. 10)

SBC also asserts that in order to support a finding of a violation of 220 ILCS 5/13-514, the Commission must find that SBC's termination charge provisions were a "knowing" attempt to impede competition. (SBC Initial Br., p. 32) TDS Metrocom disputes any assertion that the Commission must find that SBC (or its personnel through which it acts) implemented the contractual termination charge provisions with a deliberate intent to impede competition.[12] It should be sufficient if the acts or practices in question would have the likely effect of impeding competition and that this impact should have been obvious to those adopting or implementing the

[12]As SBC has noted, its previous termination charge provisions were the result of its product managers' decisions over a long period of time. (SBC Initial Br., p. 3)

policies or practices in question. Certainly, inclusion of a termination liability provision that produces termination charges of the magnitude shown in this record in long-term contracts with business customers has the obvious, likely impact of locking up these customers for the length of the contract term and making them unavailable to competitors as potential customers during that period. The adverse impact on competition is not just that the particular customers are removed from the available pool of business customers for which CLECs could compete during a particular time period. The more pernicious impact is that by shrinking the pool of available customers during the initial period of nascent competition, SBC's termination charge provisions made it much more difficult for individual CLECs to obtain the critical mass of customers, and the scale economies of operation, necessary to gain a foothold and remain in the Illinois telecommunications market. As noted above, the record shows that SBC's prior termination charge provisions were highly effective in preventing switching by business customers.

Further, contrary to SBC's assertions (see SBC Initial Br., p. 34), the Commission can find, based on the sequence of events, that SBC's adoption of new termination liability policies *was* motivated by TDS Metrocom's Complaint. While SBC asserts that the process to adopt new policies was already underway, there is no telling how long it would have taken to come to fruition had it not been for the impetus provided by TDS Metrocom's Complaint.

Finally, SBC argues that any basis that TDS Metrocom has for recovery of fees based on SBC's prior termination liability provisions dissipates after SBC announced its new termination charge policies, i.e., that TDS Metrocom would only be entitled to recovery of fees and costs incurred up to that point.[13] (SBC Initial Br., p. 33) TDS Metrocom concedes that to the extent

[13] SBC informed TDS Metrocom of SBC's intention to adopt new termination liability provisions only three days before TDS Metrocom's direct testimony was due to be filed. (TDS Metrocom Ex. 1.0, p. 17)

that its entitlement to reimbursement to fees and costs incurred in this case is based on bringing about the change in SBC's termination liability policies, that entitlement becomes weaker after SBC implemented its new policies. However, SBC's new termination liability policies were not in fact implemented until March 2004, specifically on March 8 for Usage Services, March 15 for Centrex Services and March 22 for other services.[14] (See TDS Metrocom Initial Br., p. 27; SBC Initial Br., p. 3; SBC Illinois' response to TDS Metrocom Data Request 3.3, included in TDS Metrocom Ex. 3.0) Therefore, if the Commission concludes that TDS Metrocom is only entitled to reimbursement for costs and fees incurred in this case up to the point that SBC implemented its new termination liability provisions, the appropriate cut-off point is the above-referenced dates in March 2004.

V. CONCLUSION

For the reasons set forth in its Initial Brief and in this Reply Brief, TDS Metrocom requests that the Commission issue an order in this docket granting the relief requested by TDS Metrocom as summarized at pages 3-4 of TDS Metrocom's Initial Brief.

Respectfully submitted,

TDS METROCOM, LLC

by /s/Owen E. MacBride

Peter R. Healy
Manager CLEC External Relations
TDS Metrocom, LLC
525 Junction Road, Suite 6000
Madison, Wisconsin 53717
(608) 664-4117
peter.healy@tdsmetro.com

Owen E. MacBride
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5680
omacbride@schiffhardin.com

Its attorneys

[14] Staff indicates that the new termination policies were all adopted by Advice Letter No. IL-04-93 filed with the Commission on March 19, 2004. (Staff Initial Br., p. 8)